

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Nov 10, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NATHAN B. NAVE,

Petitioner,

v.

MELISSA ANDREWJESKI,

Respondent.

NO. 2:22-CV-0186-TOR

ORDER DENYING PETITIONER'S
WRIT OF HABEAS CORPUS

BEFORE THE COURT is Petitioner Nathan B. Nave's Petition for Writ of Habeas Corpus. ECF No. 1. Petitioner, a prisoner at Coyote Ridge Corrections Center, is proceeding *pro se*. Respondent is represented by Assistant Attorney General John J. Samson. Respondent has answered the Petition and filed relevant portions of the state court record. ECF Nos. 7, 8. Petitioner filed a Traverse to Respondent's Answer. ECF No. 16. Petitioner also filed a Motion to Strike and a Motion for Summary Judgment. ECF Nos. 14, 15. The Court has reviewed the record and files herein and is fully informed. For the reasons discussed below, Nathan B. Nave's Petition for Writ of Habeas Corpus (ECF No. 1) is **DENIED**.

Petitioner's Motion to Strike and Motion for Summary Judgment (ECF Nos. 14 and 15) are denied as moot.

BACKGROUND

On August 9, 2022, Petitioner filed a Petition for Writ of Habeas Corpus. ECF No. 1. Mr. Nave is challenging his Spokane County Superior Court jury convictions for second degree rape (count 1), rape of a child in the third degree (count 2), and child molestation in the third degree (count 3). ECF Nos. 8-1 at 2-3. The underlying facts and procedural history, summarized by the Washington Court of Appeals on direct appeal, are as follows:

Danielle Valentine gave birth to I.V. in 2002. Ms. Valentine began dating Nathan Nave when I.V. was 5. The two had twin girls and eventually married. The family lived in a two-level house. I.V.'s bedroom was downstairs next to a living room and the other bedrooms were upstairs.

Once when I.V. was 11, she and Mr. Nave were watching a movie. I.V. fell asleep and, when she awoke, Mr. Nave was touching her under her shorts on her upper thigh. At the time, I.V. thought he was just massaging her legs, but was alarmed because the touching was so far up on her leg.

About two years later, I.V. fell asleep watching a movie in the living room on the opposite side of a couch from Mr. Nave. When she awoke, Mr. Nave was touching her vagina, but above her underwear. I.V. tried to go to her room, but Mr. Nave insisted she stay. He pulled her arm, but she pulled away and went to her bedroom. She did not disclose this incident to her mother, but she stopped watching movies with Mr. Nave.

The next incident occurred in early 2017. I.V. was asleep in her bedroom, facing the wall, and was awakened by someone touching

1 her. The person, whom I.V. later testified as Mr. Nave, massaged her
2 legs, rubbed her back, and touched her vagina. This occurred for 15 to
3 20 minutes, and I.V. was terrified. The person penetrated I.V.'s vagina
4 digitally. Again, I.V. did not disclose this to her mother.

5 After that incident, the sexual abuse continued three or four
6 times per week. Each time, I.V. faced the wall and often covered her
7 head with a blanket because she did not want Mr. Nave to know she
8 was awake. I.V. never saw the person who repeatedly abused her
9 during this time nor did the person ever speak to her during the abuse.

10 In the midst of this abuse, Mr. Nave once acknowledged he had
11 come into her room the prior night. While driving I.V. to school, Mr.
12 Nave said, "[A]bout last night, one of three things could happen. One,
13 you don't tell anyone and I keep doing it; two, you don't tell anyone
14 and I stop; three, you feel like you have to tell someone." Report of
15 Proceedings (RP) at 63. I.V. told him she would not tell anyone and
16 for him to stop. Mr. Nave explained that if she told someone, the
17 family would lose their home. Despite I.V.'s request that he stop, Mr.
18 Nave continued sexually abusing I.V.

19 On May 12, 2017, I.V. told her mother that Mr. Nave had raped
20 her. Her mother confronted Mr. Nave and told him to leave the house
and go to his mother's house because she needed to figure things out.
Mr. Nave then went to his mother's house. Mr. Nave quit his job, sold
his car, and traveled to New York the following day.

On May 31, 2017, the State charged Mr. Nave with one count
of rape in the second degree, one count of rape of a child in the third
degree, and one count of child molestation in the third degree. The
charges included a special allegation of aggravating circumstances for
each count, alleging that the offense was part of an ongoing pattern of
abuse of the same victim under 18 years old. Federal marshals later
served an arrest warrant on Mr. Nave in Idaho Falls, Idaho, where he
had been staying with his cousin.

Pretrial motions

Prior to trial, the State filed a motion to allow evidence that Mr.
Nave had touched I.V. when she was 11 and 13. The State argued the

1 evidence was needed to prove the charged aggravator. Mr. Nave
2 argued the prior acts were not criminal and nothing happened since
3 the 2013 incident, thus making the acts irrelevant. The trial court
4 granted the State's motion, ruling the evidence could be admitted
5 under ER 404(b) for the purpose of showing lack of accident, mistake,
6 or intent, and to show an ongoing pattern of abuse.

7 The State also filed a motion to exclude evidence that I.V.'s
8 cousin had been sexually abused by a family member. Mr. Nave
9 responded that I.V.'s mother "knows, [that I.V.] knew of the
10 allegations [yet she] was somewhat equivocal [about] the timing, but
11 fully admitted that it could have been as earl[y] as a month before
12 [I.V.] made her . . . disclosures." RP at 21 (emphasis added). Mr.
13 Nave argued the evidence was important to explain to the jury why
14 I.V. would disclose contrived accusations in May 2017. The State
15 responded that Mr. Nave had no basis to say the cousin's allegations
16 were similar and that Mr. Nave had not made a sufficient offer of
17 proof. The trial court determined that Mr. Nave's offer of proof was
18 too nebulous. The court added that it would reconsider its ruling if Mr.
19 Nave could establish the necessary link between I.V.'s and her
20 cousin's allegations outside the presence of the jury before cross-
examining I.V.

Mr. Nave filed a motion to exclude evidence he went to New
York after being confronted by Ms. Valentine. He also sought to
exclude evidence he attempted to commit suicide. The trial court
granted the motion in part, excluding evidence of his suicide attempt,
but reserving its ruling on evidence of flight.

Trial testimony of Mr. Nave

The State presented its evidence to the jury. Mr. Nave elected to
testify in his own defense. He denied ever touching I.V.
inappropriately. He also testified that after being released on bond in
Idaho, he returned to Washington as quickly as he could and presented
himself to the court.

During cross-examination, the State began asking questions that
Mr. Nave objected to as beyond the scope of Mr. Nave's direct

1 testimony. The trial court excused the jury and heard arguments from
2 both sides.

3 The State argued it was allowed to broadly question Mr. Nave
4 based on his general denial that he had ever sexually abused I.V. The
5 trial court agreed. Mr. Nave added that if the State questioned him
6 about traveling to New York, he would object. The State argued it was
7 entitled to question Mr. Nave about traveling to New York to counter
8 his testimony that he quickly presented himself to the court. The trial
9 court agreed.

10 The jury returned, and the State inquired into these areas. Mr.
11 Nave confirmed he went to his mother's house after he was told to
12 leave his house. He also confirmed he had two young biological
13 daughters who continued to live in the house, was a father figure to
14 I.V., yet quit going to work, placed his car for sale, and the next day
15 traveled to New York.

16 Verdict and sentencing

17 The jury found Mr. Nave guilty of all three counts and
18 answered yes to the special verdicts for the pattern of abuse
19 aggravator charged on each count. The court sentenced Mr. Nave to
20 194 months to life confinement.

ECF No. 8-1 at 25–29 (Ex. 2) (footnote omitted).

The Washington Court of Appeals affirmed Petitioner's convictions for
second degree rape, rape of a child in the third degree, and child molestation in the
third degree. *Id.* at 47.

Petitioner filed a petition for review in the Washington Supreme Court. ECF
No. 8-1 at Ex. 11. On February 3, 2021, the Supreme Court denied review without
comment. *Id.* at Ex. 12.

1 In January 2022, Petitioner filed a personal restraint petition in the
2 Washington Court of Appeals. *Id.* at Ex. 14. Petitioner also filed a motion in the
3 Superior Court, which was transferred to the Court of Appeals. *Id.* at Ex. 15.
4 These matters were consolidated and relief was denied. *Id.* at Ex. 18.

5 Petitioner then sought review by the Washington Supreme Court. *Id.* at Ex.
6 19. The Supreme Court denied review. *Id.* at Ex. 21. Petitioner moved to modify
7 the ruling, which was also denied. *Id.* at Ex. 22 and Ex. 23. A certificate of finality
8 was issued on July 19, 2022. *Id.* at Ex. 24.

9 Petitioner previously filed a federal 28 U.S.C. § 2254 habeas petition in this
10 Court. Case number 2:19-CV-0155-TOR, U.S.D.C. E.D. of WA. That case was
11 dismissed for various reasons including failure to exhaust. This present habeas
12 petition is not considered a “second or successive” petition because the first was
13 dismissed for lack of exhaustion. See *Slack v. McDaniel*, 529 U.S. 473, 478, 487
14 (2000) (declining to apply § 2244(b) to a second application where the District
15 Court dismissed the first application for lack of exhaustion).

16 Petitioner filed this federal 28 U.S.C. § 2254 habeas petition (ECF No. 1) on
17 August 9, 2022, alleging eleven grounds for relief:

- 18 1. The Petitioner’s conviction is based on knowingly false evidence in
19 violation of the U.S. Constitution’s 14th Amendment.
- 20 2. The Petitioner’s conviction is based on insufficient evidence in
violation of the U.S. Constitution’s 14th Amendment.

1 3. The Petitioner was denied his constitutional right to a fair trial when
2 the trial court abused its discretion by allowing “flight” evidence.

3 4. The Petitioner was denied his constitutional right to a fair trial
4 when the trial court abused its discretion by allowing “prior bad acts”.

5 5. The Petitioner was denied his constitutional right to present a
6 defense when the trial court excluded crucial evidence to that defense.

7 6. The Petitioner was denied his right to a fair trial when cross-
8 examination of the Petitioner was allowed to go beyond the limited
9 scope of the direct examination.

10 7. The court of appeals applied new, irrelevant and unconstitutional
11 evidence on appeal to affirm conviction in violation of the Petitioner’s
12 U.S. Constitutional Fourteenth Amendment rights.

13 8. The Petitioner’s defense counsel provided ineffective assistance
14 during trial resulting in a violation of the Petitioner’s U.S.
15 Constitutional right.

16 9. The Petitioner was denied his constitutional guaranteed Fourth,
17 Fifth, Sixth, and Fourteenth Amendment rights by Washington state’s
18 practices of charging by information supported only by a declaration
19 describing probable cause.

20 10. The Petitioner alleged multiple *Brady* violations.

11. Cumulative error denied the Petitioner a fair trial.

ECF No. 1 at 5-10 and 18-22; ECF No. 16 at 4-5.

Respondent concedes that Petitioner has exhausted his state remedies on
claims 1, 2, 3, 5, 8, 9, and 10 pursuant to 28 U.S.C. § 2254(b). ECF No. 7 at 11.
However, Petitioner has not properly exhausted claims numbered 4, 6, 7, and 11.

DISCUSSION

A court will not grant a petition for a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court proceedings unless the petitioner can show that the adjudication of the claim “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). Section 2254(d) sets forth a “highly deferential standard for evaluating state-court rulings which demands that state-court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (citation omitted).

I. No Evidentiary Hearing Required

Petitioner seeks an evidentiary hearing to review evidentiary claims. ECF No. 16 at 6-13. 28 U.S.C. § 2254, requires the Court to consider the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2). As to factual determinations, the Supreme Court has instructed that “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). This means that evidence not presented to the state court may not be introduced on federal habeas review if a claim was adjudicated on the merits in state court and if the underlying

1 factual determinations of the state court were reasonable. *See Murray v. Schriro*,
2 745 F.3d 984, 999-1000 (9th Cir. 2014) (“After *Pinholster*, a federal habeas court
3 may consider new evidence only on *de novo* review, subject to the limitations of
4 § 2254(e)(2).”). Two separate statutory subsections govern a federal court’s
5 review of state court factual findings:

6 Factual determinations by state courts are presumed correct absent
7 clear and convincing evidence to the contrary, § 2254(e)(1), and a
8 decision adjudicated on the merits in a state court and based on a
9 factual determination will not be overturned on factual grounds unless
objectively unreasonable in light of the evidence presented in the
state-court proceeding, § 2254(d)(2).

10 *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citation omitted); *see also Schriro*
11 *v. Landrigan*, 550 U.S. 465, 473–74 (2007). Importantly, a “state-court factual
12 determination is not unreasonable merely because the federal habeas court would
13 have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U.S.
14 290, 301 (2010). “The question under AEDPA is not whether a federal court
15 believes the state court’s determination was incorrect but whether that
16 determination was unreasonable—a substantially higher threshold.” *Schriro v.*
17 *Landrigan*, 550 U.S. at 473.

18 Accordingly, this Court finds no evidentiary hearing is required in light of
19 the evidence presented in the state court proceeding and the relevant and material
20 facts upon which this Court relies.

II. Standard of Review

A rule is “clearly established Federal law” within the meaning of section 2254(d) only if it is based on “the holdings, as opposed to the dicta, of [the Supreme Court’s] decisions.” *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Howes v. Fields*, 565 U.S. 499, 505 (2012)). A state court’s decision is contrary to clearly established Supreme Court precedent “if it applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if it confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent.” *Early v. Packer*, 537 U.S. 3, 8 (2002) (internal quotation marks omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). The state court need not cite to the controlling Supreme Court precedent, nor need it even be aware of the relevant case law, “so long as neither the reasoning nor the result of the state-court decision contradicts them.” *Id.* “[A]n unreasonable application of” clearly established federal law is one that is “objectively unreasonable, not merely wrong; even clear error will not suffice.” *White*, 572 U.S. at 419 (internal quotation marks and citation omitted). Of utmost importance, circuit precedent may not be used “to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced.” *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam).

1 In order to obtain a writ of habeas corpus, “a state prisoner must show that
2 the state court’s ruling on the claim being presented in federal court was so lacking
3 in justification that there was an error well understood and comprehended in
4 existing law beyond any possibility for fairminded disagreement.” *White*, 572 U.S.
5 at 419-20 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Under the
6 harmless error standard of review adopted by the Supreme Court, even if a
7 reviewing court finds constitutional error, the challenged error must have caused
8 “actual prejudice” or had “substantial and injurious effect or influence” in
9 determining the jury’s verdict in order for the court to grant habeas relief. *Brecht*
10 *v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted).

11 If [the section 2254(d)] standard is difficult to meet, that is because it
12 was meant to be It preserves authority to issue the writ in cases
13 where there is no possibility fairminded jurists could disagree that the
14 state court’s decision conflicts with [the Supreme] Court’s precedents.
15 It goes no further. Section 2254(d) reflects the view that habeas
16 corpus is a “guard against extreme malfunctions in the state criminal
17 justice systems,” not a substitute for ordinary error correction through
18 appeal. As a condition for obtaining habeas corpus from a federal
19 court, a state prisoner must show that the state court’s ruling on the
20 claim being presented in federal court was so lacking in justification
that there was an error well understood and comprehended in existing
law beyond any possibility for fairminded disagreement.

18 *Harrington*, 562 U.S. at 102–03 (citations omitted).

19 The petitioner bears the burden of showing that the state court decision is
20 contrary to, or an unreasonable application of, clearly established precedent. *See*

1 *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). In conducting its habeas
2 review, a federal court looks “to the last reasoned decision of the state court as the
3 basis of the state court’s judgment.” *Merolillo v. Yates*, 663 F.3d 444, 453 (9th
4 Cir. 2011) (citation omitted). A rebuttable presumption exists: “Where there has
5 been one reasoned state judgment rejecting a federal claim, later unexplained
6 orders upholding that judgment or rejecting the same claim rest upon the same
7 ground.” *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

8 The federal courts are not to grant a writ of habeas corpus brought by a
9 person in state custody pursuant to a state court judgment unless “the applicant has
10 exhausted the remedies available in the courts of the State.” *Wooten v. Kirkland*,
11 540 F.3d 1019, 1023 (9th Cir. 2008), citing 28 U.S.C. § 2254(b)(1)(A). This
12 exhaustion requirement is “grounded in principles of comity” as it gives states “the
13 first opportunity to address and correct alleged violations of state prisoner’s federal
14 rights.” *Wooten*, 540 F.3d at 1023, citing *Coleman v. Thompson*, 501 U.S. 722,
15 731 (1991).

16 A claim must be “fully and fairly” presented to the state’s highest court so as
17 to give the state courts a fair opportunity to apply federal law to the facts.

18 *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270, 276-78
19 (1971). Each claim must be presented to the state’s highest court based upon the
20

1 same federal legal theory and the same factual basis as the claim is subsequently
2 asserted in federal court. *Hudson v. Rushen*, 686 F.2d 826, 829-30 (9th Cir. 1982).

3 **III. Discussion**

4 **Claim 1: Alleged False Evidence**

5 Petitioner contends that the victim was testifying from events she believed to
6 be real based on a conversation between her and the Petitioner. ECF No. 1 at 5.
7 Petitioner contends that she was not testifying from her own memory and thus,
8 Petitioner's conviction is based on "false evidence." *Id.*

9 The Washington Court of Appeals rejected the false evidence claim in the
10 personal restraint petition proceedings. ECF No. 8-1, Ex. 18 at 387-88. The state
11 court noted, Petitioner "argues that the State violated his due process rights by
12 obtaining a conviction on evidence the State knew was false or misleading and by
13 failing to correct the record when Mr. Nave's step-child did not affirm events from
14 memory but only from an uncorroborated admission." *Id.*, Ex. 18 at 387. The
15 state court determined that "Nave fails to produce evidence to support his
16 speculative claims . . . that the State knowingly presented false or misleading
17 evidence and failed to correct the record concerning that evidence." *Id.*, Ex. 18 at
18 387-88. The court found that Nave's "contentions are based on merely conclusory
19 allegations that an investigation did not occur and that he made no admission to his
20 step-child." *Id.*, Ex. 18 at 388.

1 Denying review, the Washington Supreme Court agreed that Nave failed to
2 prove the prosecution knowingly presented false testimony. The court held:

3 Mr. Nave also argues that the prosecutor knowingly presented false
4 testimony from the victim. But he does not show that to be the case. The
5 testimony he quotes concerns the victim's initial uncertainty about whether
6 what she reported had actually happened or was a dream, which was later
7 clarified when she recounted a conversation with Nave while he was driving
8 her to school in which he admitted to what he was doing and talked about
9 the consequences of disclosing it. Mr. Nave demonstrates no knowing
10 presentation of false testimony.

8 ECF No. 8-1, Ex. 21 at 504.

9 Nave does not show the prosecution presented false evidence. More
10 importantly, Nave does not show the state court adjudication of the claim was
11 contrary to or an unreasonable application of clearly established federal law. This
12 allegation is denied.

13 **Claim 2: Alleged Insufficient Evidence**

14 Petitioner contends that the victim never observed Petitioner committing the
15 crimes. ECF No. 1 at 7. Petitioner explains that the victim believed Petitioner
16 committed the crimes because he admitted doing so. *Id.* Thus, he contends that
17 the identity of the criminal is unproven. *Id.*

18 In reviewing a claim of insufficient evidence, “the relevant question is
19 whether . . . any rational trier of fact could have found the essential elements of the
20 crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)

(emphasis in original). An applicant is entitled to relief only “if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” *Id.* at 324. In addition to the deferential view of the evidence required under *Jackson*, the habeas statute requires a high level of deference in reviewing the state court’s adjudication of the claim. *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (“We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference.”). The habeas statute therefore imposes a “twice-deferential standard” of reviewing the claim. *Parker v. Matthews*, 567 U.S. 37, 43 (2012).

The Washington Court of Appeals reasonably determined that the evidence, when viewed in the light most favorable to the prosecution, sufficiently proved that Nave committed the crime. Rejecting the claim on direct appeal, the Washington Court of Appeals held:

Mr. Nave contends there was insufficient evidence to sustain his convictions. He argues the statements made by I.V. were inconsistent, and she could not identify him as her attacker. He further argues that his statement/confession to her while driving was not sufficient to convict him under principles of corpus delicti. We disagree.

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When a defendant challenges the sufficiency of the evidence, he or she admits the truth of all of the State’s evidence. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

1 Mr. Nave first argues I.V.'s statements were inconsistent and that she
2 could not have identified him as her abuser. He emphasizes that I.V. testified
3 she never saw her abuser and the abuser never spoke to her.

4 Identity of the defendant is one of the elements all crimes share that
5 must be proved beyond a reasonable doubt. *State v. Thomson*, 70 Wn. App.
6 200, 211, 852 P.2d 1104 (1993), *aff'd*, 123 Wn.2d 877, 872 P.2d 1097
7 (1994). Where testimony of identification is unclear or inconsistent, the
8 uncertainty only goes to the testimony's weight, not its admissibility. *State v.*
9 *Vaughn*, 101 Wn.2d 604, 610, 682 P.2d 878 (1984). Issues of witness
10 credibility are matters exclusively reserved for the finder of fact and this
11 court will not review them on appeal. *State v. Thomas*, 150 Wn.2d 821, 874-
12 75, 83 P.3d 970 (2004).

13 Here, I.V. testified she always faced the wall when her abuser was
14 touching her and her abuser never spoke to her. However, the jury had to
15 weigh that fact against other facts supporting I.V.'s ability to identify Mr.
16 Nave as her abuser. First, Mr. Nave had touched I.V. inappropriately while
17 she slept before. Second, the touching was sexual and ongoing multiple
18 times per week for several weeks. Mr. Nave was the only male in the house,
19 and he had unfettered access to I.V.'s basement bedroom. Not even Mr.
20 Nave argued that I.V.'s abuser was one of her younger sisters or her mother,
all of whom slept upstairs. Third, and most important, Mr. Nave admitted he
had abused her on one occasion when he gave her various choices of
whether to report the abuse or not. Based on these facts, the jury was given
the opportunity to weigh I.V.'s credibility and decided her identification of
Mr. Nave and her accusations against him were credible. We will not disturb
the jury's credibility findings.

Mr. Nave also argues that his admission to I.V. is insufficient to
convict him under the principles of corpus delicti. The State argues that Mr.
Nave did not properly assign error to this issue. We use our discretion to
review the issue because it is simpler to refute Mr. Nave's argument than to
explain whether the argument is reviewable under RAP 2.5(a).

Corpus delicti principles protect a defendant from being convicted
through false confessions by requiring the State to show evidence of the
"body of the crime." *State v. Aten*, 130 Wn.2d 640, 655-57, 927 P.2d 210
(1996). Corpus delicti involves two elements: (1) an injury or loss (2) caused

1 by someone's criminal act. *State v. Cardenas-Flores*, 189 Wn.2d 243, 263,
2 401 P.3d 19 (2017).

3 Here, I.V. testified she was sexually assaulted over a period of several
4 weeks by a person entering her room at night while she slept. This was
5 sufficient evidence of injury caused by someone's criminal act. [footnote
6 omitted]

7 We conclude the State presented sufficient evidence for a reasonable
8 trier of fact to find beyond a reasonable doubt that Mr. Nave was the person
9 who sexually abused I.V. in the spring of 2017.

10 ECF No. 8-1, Ex. 2 at 30-32.

11 The state court reasonably rejected the challenge to the sufficiency of the
12 evidence because the evidence, viewed in the light most favorable to the
13 prosecution, proved Nave's guilt beyond a reasonable doubt. This allegation is
14 denied.

15 **Claim 3: Allowing Evidence of Flight**

16 Petitioner claims the trial judge improperly admitted "flight" evidence. ECF
17 No. 1 at 8. As to this issue, Petitioner cites to no "clearly established Federal law,
18 as determined by the Supreme Court of the United States" that would prohibit this
19 evidence. See 28 U.S.C. § 2254(d)(1). Even if the claims rested upon clearly
20 established federal law, Petitioner does not show the state court adjudication of the
claims was contrary to or an unreasonable application of such law. Here, the state
court reasoned:

1 Mr. Nave next argues the prejudicial effect of evidence of flight
2 substantially outweighed its probative value. But ER 403 does not preclude
3 prejudicial evidence, not even unduly prejudicial evidence. Instead, ER 403
4 precludes “unfair[ly]” prejudicial evidence. Mr. Nave does not explain why
5 evidence of flight was unfairly prejudicial. To the extent his unfair prejudice
6 argument is tied to his assertion he traveled to New York because he was
7 told to leave his house, we are unpersuaded. Mr. Nave left his house as
8 instructed and went to his mother’s house. He never explained why he took
9 the additional steps of quitting his job, selling his car, and traveling across
10 the country. Here, there was a reasonable and substantial inference that Mr.
11 Nave did these things as an impulsive reaction to evade arrest and
12 prosecution.

13 We conclude the trial court did not abuse its discretion by allowing
14 evidence of Mr. Nave’s flight—quitting his job, selling his car, and traveling
15 to New York.

16 ECF No. 8-1, Ex. 2 at 35.

17 This claim is denied.

18 **Claim 4: Allowing Prior Bad Act Evidence**

19 Petitioner contends the trial court abused its discretion by allowing “prior
20 bad act” evidence. ECF No. 1 at 10. Again, Petitioner cites to no “clearly
established Federal law, as determined by the Supreme Court of the United States”
that would prohibit this evidence. See 28 U.S.C. § 2254(d)(1). While Petitioner
presented this claim to the Washington Supreme Court on direct appeal as a matter
of state law, he did not present this as a federal claim.

A claim must be “fully and fairly” presented to the state’s highest court so as
to give the state courts a fair opportunity to apply federal law to the facts.

1 *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270, 276-78
2 (1971). Each claim must be presented to the state’s highest court based upon the
3 same federal legal theory and the same factual basis as the claim is subsequently
4 asserted in federal court. *Hudson v. Rushen*, 686 F.2d 826, 829-30 (9th Cir. 1982).

5 Therefore, this claim is denied as Petitioner did not properly exhaust his
6 remedies.

7 **Claim 5: Exclusion of Defense Evidence**

8 Petitioner contends the trial court excluded crucial evidence as to “the
9 origins of the fabricated allegations” and “the mind set of the accuser.” ECF No. 1
10 at 18.

11 Criminal defendants have the right to present a defense and confront
12 witnesses. *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *California v. Green*, 399
13 U.S. 149, 158 (1970); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (“Of
14 course, the right to confront and to cross-examine is not absolute and may, in
15 appropriate cases, bow to accommodate other legitimate interests in the criminal
16 trial process.”). However, the right is far from absolute, and not every evidentiary
17 ruling to exclude defense evidence infringes upon the right. *Montana v. Egelhoff*,
18 518 U.S. 37, 41-42 (1996). “The accused does not have an unfettered right to
19 offer [evidence] that is incompetent, privileged, or otherwise inadmissible under
20 standard rules of evidence.” *Id.* at 42 (quoting *Taylor v. Illinois*, 484 U.S. 400, 410

1 (1988)). Relevant evidence may, for example, be excluded on account of a
2 defendant's failure to comply with procedural requirements. *Id.* (citing *Michigan*
3 *v. Lucas*, 500 U.S. 145, 151 (1991)). And any number of familiar and
4 unquestionably constitutional evidentiary rules also authorize the exclusion of
5 relevant evidence. *Id.* at 42.

6 Here, the state court determined that the trial judge did not err:

7 Mr. Nave contends the trial court abused its discretion by excluding
8 evidence that I.V.'s cousin reported she was sexually abused at about the
9 same time I.V. reported that she had been sexually abused. He argues the
10 evidence was highly probative because it explained why I.V. contrived her
11 allegations when she did. The State responds that the trial court did not
12 preclude the evidence. Rather, it required a clearer offer of proof. We agree.

13 Prior to trial, the State filed a motion to preclude evidence that I.V.'s
14 cousin was sexually abused. Mr. Nave responded that I.V.'s mother knew
15 that I.V. had heard about her cousin, but that her mother was uncertain when
16 I.V. had heard about it. The trial court decided that Mr. Nave's description
17 of the evidence was too nebulous. The court excluded the evidence, subject
18 to Mr. Nave establishing a nexus between I.V.'s and her cousin's
19 allegations. The court told Mr. Nave he could raise the issue again prior to
20 cross-examining I.V.

But Mr. Nave did not raise the issue again. He failed to make a
specific offer of proof of what I.V. knew and when she knew it.

In *State v. Burnam*, 4 Wn. App. 2d 368, 421 P.3d 977, *review denied*,
192 Wn.2d 1003 (2018), we emphasized the importance of a specific offer
of proof. We said an offer of proof should (1) inform the trial court of the
legal theory under which the offered evidence is admissible, (2) inform the
trial court of the specific nature of the offered evidence so the court can
judge its admissibility, and (3) create an adequate record for appellate
review. *Id.* at 377. An offer of proof must not be so vague as to require the
trial court to speculate about the nature of the evidence. *Id.*

1 Here, the trial court tentatively excluded the evidence because Mr.
2 Nave's offer of proof was nebulous. Mr. Nave did not explain how I.V.'s
3 mother knew she had heard of her cousin's sexual abuse or when she had
4 heard about it. The mother's testimony might be excluded on the basis of
5 hearsay. Also, I.V. might testify that she did not know her cousin had made
6 a similar allegation or that she heard about the allegation after she had told
7 her mother that Mr. Nave raped her. Either way, the trial court justifiably
8 required Mr. Nave to raise the issue again once he could make a proper
9 connection between I.V.'s and her cousin's allegations.

6 Mr. Nave additionally argues the trial court's ruling deprived him of
7 his due process right to present a defense. We disagree. The trial court
8 allowed Mr. Nave to develop the necessary connection between I.V.'s and
9 her cousin's allegations outside the presence of the jury and suggested it
10 could be done prior to I.V.'s cross- examination. Mr. Nave did not do this.

9 Because Mr. Nave's offer of proof was not sufficiently specific, we
10 conclude the trial court did not abuse its discretion by excluding it until Mr.
11 Nave could make a sufficient offer of proof.

11 ECF No. 8-1, Ex. 2, at 37-39.

12 The trial court reasonably determined that Petitioner never made a proper
13 offer of proof to support the admission of the proposed evidence. After the judge
14 determined the preliminary offer did not lay a proper foundation for the proposed
15 evidence, Petitioner did not follow up on the matter or develop a proper
16 foundation. The judge did not err in excluding the evidence based upon the faulty
17 offer of proof. The state court adjudication of this claim was not unreasonable.
18 This claim is denied.

19 //

20 //

Claim 6: Cross-Examination Beyond Scope of Direct

Petitioner claims that he was cross-examined beyond the issues he testified to on direct. ECF No. 16 at 33. He contends that the court allowed considerable latitude, the questions did not relate to topics covered in the direct examination, nor go to inform the jury as to the Petitioner's credibility or trustworthiness, instead, the Petitioner was painted as abandoning his family and thereby distracted the jury from its task of evaluating the relevant evidence. *Id.*

Again, Petitioner cites to no "clearly established Federal law, as determined by the Supreme Court of the United States" that would prohibit this evidence. See 28 U.S.C. § 2254(d)(1). While Petitioner presented this claim to the Washington Supreme Court on direct appeal as a matter of state law, he did not present this as a federal claim.

A claim must be "fully and fairly" presented to the state's highest court so as to give the state courts a fair opportunity to apply federal law to the facts.

Anderson v. Harless, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270, 276-78 (1971). Each claim must be presented to the state's highest court based upon the same federal legal theory and the same factual basis as the claim is subsequently asserted in federal court. *Hudson v. Rushen*, 686 F.2d 826, 829-30 (9th Cir. 1982).

Therefore, this claim is denied as Petitioner did not properly exhaust his remedies.

Claim 7: Unconstitutional Evidence on Appeal

Petitioner claims the Washington Court of Appeals applied new evidence to affirm his convictions. ECF No. 1 at 19. The Court of Appeals summarized Petitioner's contention as follows:

Sixth, Mr. Nave contends the State introduced new, irrelevant, and unconstitutional evidence concerning gender on appeal in violation of RAP 9.11 and the Constitution; however, he offers no meaningful legal analysis of either authority and fails to show that there was a constitutional error or that he was somehow prejudiced.

To summarize, Mr. Nave's petition presents only conclusory allegations, some of which were previously rejected on direct appeal, and no arguable basis for relief in law or in fact. The petition is, therefore, frivolous.

ECF No. 8-1, Ex. 18 at 388.

While Petitioner presented this claim to the Washington Supreme Court in his personal restraint proceedings as a matter of state law, he did not present this as a federal claim. A claim must be "fully and fairly" presented to the state's highest court so as to give the state courts a fair opportunity to apply federal law to the facts. *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270, 276-78 (1971). Each claim must be presented to the state's highest court based upon the same federal legal theory and the same factual basis as the claim is subsequently asserted in federal court. *Hudson v. Rushen*, 686 F.2d 826, 829-30 (9th Cir. 1982).

1 Therefore, this claim is denied as Petitioner did not properly exhaust his
2 remedies nor articulate any legal analysis.

3 **Claim 8: Ineffective Assistance of Counsel**

4 A defendant in criminal proceedings has a constitutional right to effective
5 assistance of counsel. U.S. Const. amend. VI. A defendant asserting violation of
6 his constitutional right to effective assistance of counsel must demonstrate the
7 following: (1) “that counsel’s representation fell below an objective standard of
8 reasonableness,” and (2) “that there exists a reasonable probability that, but for
9 counsel’s unprofessional errors, the result of the proceeding would have been
10 different.” *Kimmelman v. Morrison*, 477 U.S. 365, 374–75 (1986) (citing
11 *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). Regarding the first
12 prong, a “tactical decision about which competent lawyers might disagree” does
13 not qualify as objectively unreasonable. *Bell v. Cone*, 535 U.S. 685, 702 (2002).
14 “Judicial scrutiny of counsel’s performance must be highly deferential,” and “a
15 court must indulge a strong presumption that counsel’s conduct falls within the
16 wide range of reasonable professional assistance[.]” *Strickland*, 466 U.S. at 689.
17 Additionally, habeas courts must be deferential not only to the decisions of defense
18 counsel, but also to the decisions of the state courts as required under 28 U.S.C.
19 § 2254(d)(1). *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (doubly
20 deferential judicial review applies to a *Strickland* claim evaluated under the

1 § 2254). Moreover, the Supreme Court “has never required defense counsel to
2 pursue every claim or defense, regardless of its merit, viability, or realistic chance
3 for success.” *Id.*

4 Here, Petitioner contends that defense counsel was ineffective by failing to
5 “acquire exculpatory evidence crucial to the primary defense” concerning the
6 victim’s cousin’s allegations of sexual abuse and failed to “re-cross” petitioner
7 “when the State presented a series of questions intending to indicate the
8 Petitioner’s travel as an admission of guilt.” ECF No. 1 at 20; ECF No. 16 at 40-
9 41.

10 The Washington Court of Appeals reasonably rejected Petitioner’s claim
11 about his counsel’s investigation:

12 . . . Mr. Nave fails to produce evidence to support his speculative claims that
13 the defense and prosecution failed to investigate his step-child’s knowledge
14 of her cousin’s report of sex abuse, that the fruit of such an investigation
15 would have resulted in exculpatory evidence, and that the State knowingly
16 presented false or misleading evidence and failed to correct the record
concerning that evidence. Again, his contentions are based on merely
conclusory allegations that an investigation did not occur and that he made
no admission to his step-child.

17 ECF No. 8-1, Ex. 18 at 387-88.

18 The Washington Court of Appeals reasonably rejected Petitioner’s claim that
19 his counsel did not rehabilitate his testimony on redirect:

20 Mr. Nave first contends trial counsel was ineffective for failing to
rehabilitate him on redirect after the State cross-examined him about his

1 travels to New York and for failing to present to the jury an explanation
2 alternative to guilt to explain his travels. Mr. Nave's ineffective assistance of
3 counsel claim appears to be an attempt to improperly recast his unsuccessful
4 challenge on direct appeal to the admission of evidence of his travels to New
5 York.

6 ECF No. 8-1, Ex. 18 at 386. Because the flight evidence was admissible, no
7 ineffective assistance of counsel has been shown.

8 Other than broad assertions and conclusions, he has not shown that there is
9 any reasonable probability that, but for counsel's unprofessional errors, the result
10 of the proceeding would have been different.

11 This claim is denied.

12 **Claim 9: Charged by Information, Not Indictment**

13 This Court previously denied Petitioner's very same argument on this issue.
14 Case number 2:19-CV-0155-TOR, U.S.D.C. E.D. of WA. The United States
15 Supreme Court stated long ago: "Prosecution by information instead of by
16 indictment is provided for by the laws of Washington. This is not a violation of the
17 Federal Constitution." *See Gaines v. State of Washington*, 277 U.S. 81, 86 (1928).
18 Consequently, Petitioner's assertions to the contrary are legally frivolous.

19 **Claim 10: *Brady* Violations**

20 Petitioner contends that the State's investigator and prosecutor suppressed
exculpatory evidence from the defense in violation of *Brady v. Maryland*. ECF
No. 1 at 22. In his Traverse, Petitioner contends the investigation detective

1 “learned of a leading line of questioning originating from Crime Check and I.V.’s
2 mother before the detectives recorded interview.” ECF No. 16 at 45. Petitioner
3 contends this information was “false tainted information”. *Id.* Petitioner then
4 contends crucial impeachment evidence of the cousin’s contemporaneous
5 disclosure, the motive for false accusations, was suppressed. *Id.* at 46.

6 “A *Brady* violation occurs when the government fails to disclose evidence
7 materially favorable to the accused.” *Youngblood v. W. Virginia*, 547 U.S. 867,
8 869 (2006) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). A court should
9 find that evidence is material “only if there is a reasonable probability that, had the
10 evidence been disclosed to the defense, the result of the proceeding would have
11 been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). “A reasonable
12 probability is a probability sufficient to undermine confidence in the outcome.” *Id.*
13 (internal quotation marks omitted). “To state a claim under *Brady*, the plaintiff
14 must allege that (1) the withheld evidence was favorable either because it was
15 exculpatory or could be used to impeach, (2) the evidence was suppressed by the
16 government, and (3) the nondisclosure prejudiced the plaintiff.” *Smith v. Almada*,
17 640 F.3d 931, 939 (9th Cir. 2011) (citation omitted). A *Brady* violation does not
18 exist in a case in which the allegedly suppressed evidence is known by the defense.
19 *See United States v. Dupuy*, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985) (“Since
20 suppression by the Government is a necessary element of a *Brady* claim, if the

1 means of obtaining the exculpatory evidence has been provided to the defense, the
2 *Brady* claim fails.”) (citations omitted).

3 Here, the Washington Court of Appeals reasonably rejected the claims
4 because Petitioner failed to show the prosecution withheld materially exculpatory
5 evidence:

6 Mr. Nave contends the State committed multiple *Brady* violations by
7 suppressing the evidence that I.V.’s cousin disclosed a sexual assault against
8 her and by allowing I.V. to perjure herself with inconsistent statements. Mr.
9 Nave misconstrues what a *Brady* violation is.

10 A *Brady* violation requires proof of three elements: “[(1)] The evidence at
11 issue must be favorable to the accused, either because it is exculpatory, or
12 because it is impeaching; [(2)] that evidence must have been suppressed by
13 the State, either willfully or inadvertently; and [(3)] prejudice must have
14 ensued.” *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011)
15 (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82,
16 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). When viewing the second
17 element, the key factor is that the State must be in possession of evidence
18 that it does not turn over to the defense and that evidence must have been
19 unobtainable to the defense through its own investigation. *Id.* at 895-96.

20 Mr. Nave complains the State committed a *Brady* violation when it
successfully prevented him from inquiring about I.V.’s cousin’s allegation
against a family member and when a detective suggested to I.V. that Mr.
Nave had oral contact with her. Neither of these complaints involve the State
failing to turn over evidence to Mr. Nave. Mr. Nave was aware of the
evidence, sought to have the cousin’s allegation admitted, and asked
questions at trial about the detective’s purported improper suggestion.

ECF No. 8-1, Ex. 2, at 45-46.

Petitioner frames his claims as a *Brady* violations, but he knew of the
allegedly exculpatory evidence, and attempted to admit the evidence at trial. The

1 trial judge excluded the evidence because Petitioner did not lay a proper
2 foundation prior to trial and did not raise the issue later during trial. This Court
3 finds the state court's conclusions were neither an unreasonable determination of
4 the facts nor an unreasonable application of the clearly established constitutional
5 law as set forth by *Brady*. This claim is denied.

6 **Claim 11: Cumulative Error**

7 Petitioner claims that cumulative error warrants relief. ECF No. 1 at 22.
8 However, Petitioner did not cite to federal law or otherwise specifically present
9 this claim to the Washington Supreme Court as a federal claim. Petitioner cited
10 state law in presenting this claim to the state court. ECF No. 8-1, Ex. 11 at 315.

11 A claim must be “fully and fairly” presented to the state’s highest court so as
12 to give the state courts a fair opportunity to apply federal law to the facts.

13 *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270, 276-78
14 (1971). Each claim must be presented to the state’s highest court based upon the
15 same federal legal theory and the same factual basis as the claim is subsequently
16 asserted in federal court. *Hudson v. Rushen*, 686 F.2d 826, 829-30 (9th Cir. 1982).

17 Therefore, this claim is denied as Petitioner did not properly exhaust his
18 remedies. Moreover, Petitioner is not entitled to relief because he has not shown
19 the existence an any single constitutional error nor multiple errors that could
20 cumulate to cause prejudice. This claim is denied.

IV. Conclusion

Based on the foregoing, this Court finds that the state court's rejection of Petitioner's claims was neither contrary to nor involved an unreasonable application of clearly established constitutional law as determined by the United States Supreme Court, nor an unreasonable determination of the facts in light of the evidence that was presented in the state court proceeding. Thus, habeas relief is not warranted on these claims.

V. Certificate of Appealability

A petitioner seeking post-conviction relief under section 2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. A COA may issue only where a petitioner has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

This Court concludes that Petitioner is not entitled to a COA because he has not demonstrated that jurists of reason could disagree with this Court's resolution

1 of his constitutional claims or could conclude that any issue presented deserves
2 encouragement to proceed further.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

4 1. Petitioner's Petition for Writ of Habeas Corpus (ECF No. 1) is **DENIED**.

5 2. Any appeal taken by Petitioner of this matter would not be taken in good
6 faith as he fails to make a substantial showing of the denial of a
7 constitutional right. **Accordingly, a certificate of appealability is**
8 **denied.**

9 3. Petitioner's Motion to Strike and Motion for Summary Judgment (ECF
10 Nos. 14 and 15) are **denied as moot**.

11 The District Court Executive is directed to enter this Order and Judgment
12 accordingly, furnish copies to the parties, and **CLOSE** the file.

13 **DATED** November 10, 2022.



A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge